STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 18, 2008
v DENNIS WAYNE VESEY, Defendant-Appellant.	No. 266617 Washtenaw Circuit Court LC No. 04-001243-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v DAMEKO DWAYNE VESEY, Defendant-Appellant.	No. 266618 Washtenaw Circuit Court LC No. 04-001244-FC

Before: Talbot, P.J., and Cavanagh and Zahra, JJ.

PER CURIAM.

In Docket No. 266617, defendant Dennis Wayne Vesey appeals as of right his jury trial convictions for three counts of first-degree felony murder, MCL 750.316(1)(a), armed robbery, MCL 750.529, conspiracy to commit armed robbery, first-degree home invasion, MCL 750.110a(2), conspiracy to commit first-degree home invasion, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced as a second habitual offender, MCL 769.10, to mandatory life without parole on each of the first-degree murder convictions, 20 to 30 years' imprisonment for each of the convictions of armed robbery, conspiracy to commit armed robbery, first-degree home invasion and conspiracy to commit first-degree home invasion, two years' imprisonment for the felony-firearm conviction, and 40 months to 90 months' imprisonment for the felon in possession of a firearm conviction.[1] We affirm.

[1] The trial court vacated defendant Dennis Vesey's sentences for armed robbery and first-degree (continued…)

In Docket No. 266618, defendant Dameko Dwayne Vesey appeals as of right his jury trial convictions for three counts of first-degree felony murder, MCL 750.316(1)(a), armed robbery, MCL 750.529, conspiracy to commit armed robbery, first-degree home invasion, MCL 750.110a(2), and conspiracy to commit first-degree home invasion. Defendant was sentenced to life in prison without parole on each of the felony murder convictions, 15 to 30 years' imprisonment each for the armed robbery and conspiracy to commit armed robbery convictions, and 13 to 20 years' imprisonment each for the first-degree home invasion and the conspiracy to commit first-degree home invasion convictions.[2] We affirm.

I. Factual Background

These consolidated appeals[3] arise from the convictions of brothers and codefendants, Dennis and Dameko Vesey, for the murders of Taurus Hill (Hill) and his girlfriend, Tayquelea Roberson (Roberson), on April 5, 2003, at an apartment complex located on South Harris Road in Ypsilanti, Michigan.[4] Defendants were also charged and convicted for the death of Hill and Roberson's infant son, Taurus Hill, Jr. (dob: January 8, 2003). The infant died following the shooting of his mother, Roberson, who fell on the infant suffocating him.

Hill was a known drug dealer in the Ypsilanti area. On the evening of April 4, 2003, Hill and Roberson were at home in their apartment with their infant son, Taurus, Jr., and three other minor children: Tyranique Hill (dob: February 27, 1994), Dakaisia Roberson (dob: June 25, 1997), and Jasmine Harris (dob: January 17, 1998).[5] Tyranique indicated that she and Dakaisia and Jasmine were in the living room watching television. Tyranique reported that there was a knock at the front door. Hill answered the door and permitted a man that she did not know to enter the apartment. The man sat at the kitchen table with Hill and conversed for a brief period. Hill left the table and went into the bedroom, returning within a few minutes. Shortly thereafter, the man left the apartment. During her second interview with police, Tyranique reported the same man returned to the apartment but did not enter, remaining in the doorway speaking briefly with Hill.

In the early morning hours of April 5, 2003, while Tyranique and the children remained on the couch watching television, there was a third knock on the apartment door. Tyranique saw Hill glance out the window before opening the door. Once Hill began to open the door Tyranique observed two masked men rush into the apartment. One of the men began physically

(…continued)

home invasion "because of the felony murder sentence."

[2] The jury acquitted defendant Dameko Vesey of the conspiracy to commit premeditated murder and felony firearm charges. The trial court vacated defendant's sentences for the first-degree home invasion and armed robbery convictions "based on felony murder sentence."

[3] *People v Vesey*, unpublished order of the Court of Appeals, entered January 24, 2006 (Docket Nos. 266617 and 266618).

[4] Defendants' cousin, Michael McGaha, was a codefendant in the murder trial, but was acquitted of all charges by a separate jury.

[5] Tyranique is Taurus Hill's daughter with Michelle Cowan. Dakaisia is the daughter of Roberson and Roosevelt Williams. Jasmine is Roberson's niece.

fighting Hill and he fell on the floor by Tyranique. Tyranique and the other two girls ran and hid in bedrooms in the apartment, but could hear a man in the master bedroom confronting Roberson and demanding money. Tyranique also saw one of the men pointing a gun at Roberson. Tyranique heard her infant brother crying from the master bedroom. When she tried to retrieve the infant, one of the masked men yelled at her and she fled the room and returned to another bedroom and closed the door.

Tyranique heard four shots. She identified two of the shots as coming from the living room and the remainder from the master bedroom, but was unsure of the order of occurrence. She then heard water running in the kitchen and the closing of the front door. Tyranique waited and then gathered Dakaisia and Jasmine, instructing them to dress and led them out of the apartment. The girls initially hid when they exited the apartment because Tyranique observed two vehicles coming out of the adjacent trailer park and feared it might be the masked men returning. She described the vehicles as having tinted windows. One of the vehicles was "white and long" and similar to her father's car. The second vehicle was described as "cute, a nice car," which was loudly playing Rap music. The girls walked down Harris Road to Ford Boulevard and tried to go into a local party store, but were unsuccessful because it had closed for the night. The girls hid a second time when they saw another approaching vehicle; again fearing it contained the masked men. The girls, led by Tyranique, continued walking until they found an open pizza parlor. Tyranique requested use of the telephone and, with the assistance of a store employee, phoned 911 and reported the events.

When interviewed by police, Dakaisia's and Jasmine's version of the events was similar to Tyranique's as they both described the entry into the apartment of two masked men with handguns demanding money. While the girls could only provide a limited description of the clothing the men wore, Tyranique described one of the perpetrators as being larger than the other and that one of the men had braids hanging below his mask to his shoulders. Tyranique provided details regarding the masks, describing them as thin enough to see through, like nylons or stockings. Although Tyranique was unable to provide a more detailed facial description of the perpetrators she indicated that she believed one of the men was the same individual that had entered the apartment earlier in the evening and sat at the kitchen table with Hill, based on her recognition of his voice. At trial, when presented with a photo array, Tyranique identified codefendant Michael McGaha as the man she observed with Hill at the kitchen table. However, a police officer involved in the investigation, Detective Everette Robbins, reported that when interviewed and presented photographs by the police at the time of these events, Tyranique identified defendant Dameko Vesey as the individual seated at the kitchen table with Hill before the murders.

Most neighbors of the victims were not forthcoming or cooperative with police regarding their observations immediately before the murders in the apartment complex and parking lot. Neighbors initially declined to speak or later admitted lying to police because they did not want to be involved due to fear of retaliation or disinterest. However, neighbors of Hill and Roberson, Joyce Jordan and her daughter Tanet Jordan, revealed that they heard arguing in the parking lot shortly before hearing gunshots. Tanet indicated that she saw Dennis Vesey speaking with another resident of the complex, Nerissa Pittman, and also observed Dennis Vesey arguing with Hill. Tanet reported seeing Dennis Vesey driving a silver or tan SUV and observed Pittman run past her apartment window immediately following the gunshots. Joyce also reported seeing Hill,

Roberson and Dennis Vesey arguing in the parking area of the apartment complex before the gunshots occurred. After Hill and Roberson walked away, Joyce reported seeing Dennis Vesey go to his vehicle and retrieve a gun. Joyce observed two other individuals in defendant's vehicle, one was in the rear passenger area and one, who looked like Dameko Vesey, was in the front passenger seat and was also holding a gun. Joyce stated that she observed Pittman walk past her window in the direction of the apartments at the back of the building, where Hill and Roberson's apartment was located, and that Dennis Vesey and the others followed in the same direction. Within minutes Joyce heard gunshots and saw Dennis Vesey's vehicle and another vehicle pull out of the parking lot. Joyce acknowledged that she had consumed alcohol that evening and lied at the preliminary examination because she did not want to get involved in the police investigation.

The primary witness, Nerissa Pittman, was also charged as an accomplice in this matter. Pittman pleaded guilty to second-degree murder, MCL 750.317, and agreed to testify against defendants. She had not yet undergone sentencing while defendants' trial was in progress. At the time of the murders, Pittman was residing in an apartment within the complex with her minor child, her mother and younger siblings. Pittman stated that approximately a week before the murders she commented to another neighbor, Darius Frazier, that Hill had a lot of money but had never been robbed. Shortly thereafter, Pittman claimed to observe Frazier give two handguns to defendant Dennis Vesey.

On April 4, 2003, Pittman claimed that she was with a male friend, Jovan Hurston, at the trailer where he was residing. Pittman asserted her minor son accompanied her and that she engaged in sexual relations with Hurston and smoked marijuana. Later that night or very early in the morning on April 5, 2003, Pittman asserted she phoned Dennis Vesey to secure additional marijuana and was informed that he was parked at the South Harris apartments. Pittman asked Hurston to drive her to her mother's apartment so that she could procure items to spend the night. Hurston transported her to the complex but remained in his vehicle. Pittman approached Dennis Vesey's car, and he requested that Pittman assist in the robbery by knocking on Hill's apartment door. Pittman claimed that she frequently borrowed cigarettes from Roberson, implying she would be recognized by Hill and able to gain entry into the apartment. Pittman knocked on the apartment door. When Hill opened the door, Pittman asserted that defendants and McGaha rushed into the apartment. Pittman averred that none of the participants in the robbery, including her, were wearing masks. Pittman opined that the handguns carried by Dennis Vesey and McGaha appeared to be the same as the handguns provided by Frazier. Pittman entered the apartment and went to the back bedroom and took some ecstasy pills. McGaha was confronting Roberson in the master bedroom regarding the location of money in the apartment. Dameko Vesey was observed "rambling" through the apartment, while Dennis Vesey was struggling with Hill in the front room. As Pittman was leaving the apartment, she heard two gunshots. She proceeded to her mother's apartment, retrieved a diaper bag, returned to Hurston's waiting vehicle and left with him, returning to his trailer. She did not return to the apartment complex until the following morning. Pittman acknowledged that she lied to police when initially questioned regarding the events of that evening.

II. Analysis

A. Third-Party Culpability

Defendants assert numerous errors by the trial court in precluding the admission of evidence pertaining to the culpability of individuals, other than defendants, in the robbery and murder of Hill, Roberson and their infant son. This Court reviews a trial court's rulings regarding the admission of evidence for an abuse of discretion. *People v Bauder*, 269 Mich App 174, 179; 714 NW2d 506 (2005). An abuse of discretion occurs when a trial court's determination is outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). In addition, a trial court's evidentiary rulings, which implicate a defendant's right to confrontation and to present a defense, are reviewed de novo by this Court. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002); *People v Beasley*, 239 Mich App 548, 557; 609 NW2d 581 (2000).

Specifically, defendants contend the trial court erred by limiting testimony by Gwendolyn Hill, Taurus Hill's mother, regarding a previous break-in to Hill and Roberson's apartment by Louis Fairley and his threatening behavior to Roberson. Defendants further challenge the exclusion of testimony by Gwendolyn Hill regarding injuries to the hand and three "teardrop" tattoos she observed on Maurice Robinson a week or more after the murders, which were interpreted as signifying his involvement in the crimes. Defendants contend that Maurice Robinson's status as a potential suspect in these murders was further implicated by Tanet Jordan's testimony that she spoke with him by telephone the morning of the murders. Robinson broke a breakfast date with Tanet stating he could not approach the apartments due to police cordoning off the area. Robinson reportedly indicated he had spent the night riding around with "Juan" and implied detailed knowledge of the killings.[6]

We note that Gwendolyn Hill did testify that her son and Fairley were friends but recently experienced a falling out and that Fairley's nickname was "Killus." Defense counsel was also able to establish through this witness that her son was familiar with other individuals identified in the apartment complex parking lot at the time of the murders, including Maurice Robinson and Tomeka Buyers. Gwendolyn Hill was not precluded from testifying regarding her observation of Maurice Robinson after the murders and that he evidenced a wrist injury. However, the trial court did suppress testimony by Gwendolyn Hill that comprised hearsay. Specifically, it was determined that this witness did not have personal knowledge regarding the details of the alleged problems that had occurred between Hill, Roberson and Fairley. The trial court also precluded testimony by this witness regarding the street meaning of Maurice Robinson's teardrop tattoos as "signal[ing] killings or murders." Notably, defendants' counsel elected not to question Robinson when he was brought to court regarding his tattoos and any attribution to their meaning. Defense counsel argued for the admissibility of this evidence, stating in relevant part:

> Because the defense is that someone else did it my position is that regardless of the hearsay rule I'm entitled to introduce the evidence as part of due process right

[6] Although Joyce and Tanet Jordan indicated they knew Dennis Vesey by the name "Juan," defendants suggest that other possible suspects observed in the area that evening were also known by that name.

> to present a defense. The witness gave information to the police about Fairley – people who are potential suspects at this time.

However, the trial court rejected this argument, ruling:

> To the extent there is any relevancy and I'm assuming for a moment that there may be it may only be admitted as admissible evidence. That is hearsay. There is no hearsay exception for what you are trying to offer.
>
> If there's some other person who may have been culpable here you certainly have the right to bring in witnesses who have personal knowledge of that motivation or that conduct. But this witness [Gwendolyn Hill] was not a proper witness to offer any theory in that regard.

Defendants also argued that the trial court erred in precluding Tanet Jordan's testimony regarding statements made to her by Maurice Robinson, implying his involvement in the crimes. We would first note that the statements allegedly made by this individual to Tanet are not readily discernable as exculpatory for defendants. Maurice Robinson indicated he spent the night riding around with "Juan." This, coupled with his alleged knowledge of details of the murders, serves more to inculpate than exculpate defendant Dennis Vesey who is also known by the name "Juan." In addition, the statements attributed to Maurice Robinson by Tanet are merely conclusory and based on assumption. The alleged statement does not acknowledge any involvement in the crime by Robinson. Most importantly, the trial court properly ruled the testimony of Tanet regarding these statements would constitute inadmissible hearsay. Maurice Robinson was brought to court and questioned by counsel outside the presence of the jury. He denied the statements attributed to him by Tanet and denied even knowing her. Based on this denial, defendants' counsel sought to allow Tanet to testify regarding the statements in order to impeach the testimony of Maurice Robinson. However, the trial court properly denied this request, recognizing that Tanet's testimony would comprise hearsay.

Defendants also challenge the failure of the trial court to permit testimony by Tiffany Juneau. While both were incarcerated in the Washtenaw County jail, Juneau spoke with Antone Swanson. Swanson reportedly told Juneau that he drove Hill and Roberson's killers to the scene and picked them up, but refused to name them. Juneau provided this information to detectives in a letter. Defendants claim that this evidence is relevant and exculpatory because other witnesses, such as Tanet Jordan, identified Swanson as being in the apartment complex parking lot immediately before and after the murders occurred. Purportedly, Swanson also acknowledged, several weeks before the murders, to Roosevelt Williams[7] that he had a "lick to hit." At this same time a friend of Swanson's was attempting to sell a .380 pistol, which was the same caliber handgun as used in the homicides but which was never recovered.

Similar to the arguments pertaining to the alleged admissions by Maurice Robinson to Tanet Jordan, defendants contended there existed a third-party culpability exception for hearsay

[7] Roosevelt Williams is the father of Dakaisia Roberson, who was present in the apartment at the times of the murders.

pertaining to statements purportedly made by Antone Swanson to Tiffany Juneau. The trial court made arrangements for the detention and transport of Juneau, who was in Louisiana, to Michigan to testify regarding her letter to detectives. However, the trial court first brought in Swanson from prison to provide testimony outside the presence of the jury to determine the admissibility of Juneau's anticipated testimony. Swanson denied making any such statements and asserted that he did not know Juneau. In fact, Swanson averred that he was not at the jail for any length of time because he was given and passed two polygraph tests and "[b]onded out immediately." Defendants' counsel argued the admissibility of the testimony because it supported "the defense [theory of] third party culpability and the inference the jury could draw is that others had the motive and opportunity and, in fact, even made admissions to involvement. And, therefore, makes the defense theory more likely true . . . [as] an issue of simple relevance." The trial court, once again, properly rejected this argument, determining the statement merely comprised inadmissible hearsay.

In addition, subsequent to the close of proofs but before the jury had rendered a verdict, defendants' counsel received a letter from another prison inmate, Nicholas Ross. Ross was incarcerated with Antone Swanson and reported that Swanson told Ross that defendants were not involved in the Hill and Roberson murders. Ross asserted Swanson indicated he knew who committed the murders but would not disclose their identities because they threatened to kill anyone who identified them to police, including Tyranique. Without naming Pittman, the letter suggested that she lied in order to avoid retaliation by the actual perpetrators. In addition to being put forth as evidence of third-party culpability, defendants also contend that this letter comprises newly discovered evidence necessitating the conduct of an evidentiary hearing or new trial, which was denied by the trial court.

Finally, defendants cite to a 2004 letter written by Pittman to Sharmik Willis while in jail. Although the letter was purportedly written before the trial initiated but not discovered until its conclusion, defendants contend it demonstrates Pittman committed perjury and constitutes newly discovered evidence of third-party culpability. In the letter, Pittman only asserts her own innocence. Her statement that "I told them what they wanted to hear" does not sufficiently serve to implicate other, unidentified individuals as being responsible for the crimes and, therefore, is not exculpatory for defendants. Specifically, the letter states, in relevant part:

> I was facing life for some shit I don't even know about, okay. So I feel as if I'm doing a nuther [sic] person [sic] time. I told them what they wanted to hear. My life is most important.
>
> I feel like fuck the world. I know it's not right but people don't play fair. So me neither. its [sic] me or them feel me?

Defendant Dameko Vesey further asserts that the identification by witnesses of other viable suspects in the vicinity of the crime, coupled with the lack of physical evidence substantiating defendants' presence in Hill and Roberson's apartment and the acquittal of codefendant McGaha further bolsters the importance and necessity of the admission of the proffered statements to support defendants' assertion of third-party culpability.

In support of their contention that the trial court erred in precluding the proffered testimony based on hearsay, defendants primarily rely on two cases: *Chambers v Mississippi*,

410 US 284; 93 S Ct 1038; 35 L Ed 2d 297 (1973), and *People v Barrera*, 451 Mich 261; 547 NW2d 280 (1996). In *Chambers*, the United States Supreme Court determined the lower courts had erred in excluding evidence of a third party's admission of guilt that was deemed critical to the defense and which "bore persuasive assurances of trustworthiness." *Chambers, supra* at 302. The Court ruled, "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Id.* However, the factual circumstances of *Chambers* are readily distinguishable from this case.

In *Chambers* the defendant was on trial for murder. Another individual provided a written confession of his own guilt for the murder, fully exculpating the defendant, but then later retracted the confession. In addition, this third party acknowledged to three other independent persons that he had committed the murder. These admissions were precluded by the trial court based, in part, on the absence of a hearsay exception in that jurisdiction for statements against penal interest and the defendant was subsequently convicted. The Supreme Court determined "[t]he hearsay statements involved in this case were originally made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability." *Id.* at 300. Specifically, the Court noted that the "confessions [were] made spontaneously to a close acquaintance shortly after the murder" and that "each one was corroborated by some other evidence." *Id.* In addition, the Court observed that "[t]he sheer number of independent confessions provided additional corroboration for each" with the confessions being "in a very real sense self-incriminatory and unquestionably against interest." *Id.* at 300-301.

In *Barrera*, the trial court was found to have erred by excluding statements made by a codefendant that were offered as exculpatory evidence. Such error was not deemed to be harmless. *Barrera, supra* at 263-264. Again, the factual circumstances of this case are distinguishable from defendants' situation resulting in an overly broad interpretation and attempted use of this ruling to support their assertion of error. In *Barrera*, a codefendant, Copeland, admitted guilt in reference to the stabbing and murder of a prostitute. Copeland acknowledged that only he stabbed the victim and that her murder was spontaneous and the result of his mistaking the victim for his ex-girlfriend while under the influence of drugs and alcohol. This admission was not only exculpatory regarding the actions of Copeland's codefendants but further supported their defense regarding the lack of premeditation for the killing. The trial court ruled that Copeland's statement "was not exculpatory" with regard to his codefendants and "that there was insufficient corroborating evidence of statements" with regard to their trustworthiness. *Id.* at 285. Our Supreme Court reversed the lower court, finding "that the critical portions of Copeland's statement . . . were against his penal interests and should be admitted on retrial." *Id.* at 297-298. However, the Court clarified the limits of the ruling, stating:

> [W]e do not hold that a trial court should allow a defendant to present unreliable evidence . . . . Instead, we hold that a trial court cannot place too many hurdles in front of admitting evidence that is not only crucial to the defense theory and uncontradicted by any other evidence in the case, but also has some common-sense basis of trustworthiness. [*Id.* at 297 (citation omitted).]

Relying on prior federal decisions, the *Barrera* Court discussed the importance of determining whether a statement is against penal interest, noting "[i]t must actually assert the declarant's own culpability to some degree—it cannot be a statement merely exculpating the accused." The

Court also reviewed the factors involved in determining the trustworthiness of the statement as encompassing "two distinct elements . . . [T]he statement must actually have been made by the declarant, and it must afford a basis for believing the truth of the matter asserted." *Id.* at 273-274 (citations omitted).

Applying the case law relied on by defendants to the statement attributed to Swanson by Juneau; we find the trial court did not err in precluding the proffered testimony. The purported admission by Swanson to Juneau that he picked up and dropped off the individuals that murdered Hill and Roberson was made to a jail inmate, did not involve a statement to police and did not serve to inculpate Swanson or exculpate defendants. Following the guidelines established in *Barrera* the statement could not be construed in a manner that would be incriminating as a statement against penal interest. The vague statement does not, in any manner, exculpate defendants as it neither confirms nor denies their involvement in the crimes. Further, there is no corroboration regarding either the existence or content of the alleged statement to Juneau given Swanson's absolute denial that it occurred.

In reference to the alleged statements made or overheard by Roosevelt Williams, it is problematic that there exists no record evidence that defendants ever sought to procure or introduce testimony by Williams on this matter. In addition, the purported statements were not sufficiently incriminating by nature and were completely uncorroborated. Similar problems arise with the Ross letter, which does not contain any statement attributable to Swanson against penal interest. Ross merely alleges Swanson indicated defendants did not commit the crime and that he knew who was responsible and their threats to harm the child that could identify them. Police interviewed Ross who was minimally and only briefly cooperative. Ross denied having any information regarding the perpetrators of the crimes.

As a result, defendants' reliance on the alleged statements and letters as exculpatory and requiring admission to support their assertion of third-party culpability is misplaced. This Court has previously upheld a trial court's determination to exclude evidence pertaining to third-party culpability because it was merely speculative. *People v McCracken*, 172 Mich App 94, 98-99; 431 NW2d 840 (1988). This Court's prior ruling that evidence, which tends to incriminate another person is admissible if it creates more than a mere suspicion that another person was actually the perpetrator, *People v Kent*, 157 Mich App 780, 793; 404 NW2d 668 (1987), is not applicable to the factual circumstances of this case. In this appeal, any evidence of the culpability of a third-party was merely speculative and based solely on suspicion. As a result, the trial court properly excluded these statements and did not violate defendants' due process right to present witnesses in their defense.

B. Error In Admission of Detective Testimony

Defendants next assert that the trial court erred in permitting the detective in charge of the investigation, Robbins, to testify that police lacked evidence that anyone other than defendants had entered Hill and Roberson's apartment. This Court reviews a trial court's rulings regarding the admission of evidence for an abuse of discretion. *Bauder, supra* at 179.

The challenged testimony came during direct examination by the prosecutor. Her initial inquiry focused on whether the police "during the course of the investigation" had looked at or investigated any other potential suspects or individuals. Robbins verified that the police had

investigated "many people" in conjunction with this crime and that "[a]ny tip" received "was followed up on appropriately." The prosecutor then proceeded to name nine different individuals, all of whom had been suggested by defendants as possible suspects or who were identified by witnesses as being in the area of the apartment complex at the time of the murders. Robbins verified that all these individuals had been interviewed, acknowledging that he may not have personally contacted all the named persons but that members of his department had conducted interviews. At this point, the prosecutor queried, "Did you receive any information that any of these individuals entered the apartment that I've just listed?" Counsel for defendants objected on the basis of hearsay and relevancy. The prosecutor responded that she was "not offering that for the truth of the matter asserted but just for purposes of directing the investigation and, and where that led him." Following a brief exchange between counsel, the trial court ruled the testimony admissible and instructed the jury:

> This testimony is being offered not for its truth and you must not consider it as such. This is offered to show what the investigator did or didn't do as a result of it and that's the only purpose for which it's offered and that's the only purpose for which you may consider it.

Robbins then answered, "Our investigation did not reveal that any other persons other than the four co-defendants ever entered that apartment at any time." Defendants' counsel again objected and the trial court instructed the prosecutor to "ask what he did next."

At the conclusion of Robbins's testimony, counsel for defendant Dennis Vesey orally requested the trial court strike the previously challenged testimony "based on hearsay, it's irrelevant, it's not within his personal knowledge," and that the statement constituted personal opinion. In the alternative, counsel sought the grant of a mistrial. The trial court denied both motions based on its instruction to the jury of the "very narrow purpose" for which the testimony could be used. The court also provided the jury with instructions, at the conclusion of trial, defining what constituted evidence and that testimony by police officers was to be judged by the same standards for credibility as any other witness.

In this matter, the detective's testimony that there was no physical evidence demonstrating that individuals other than codefendants had entered the victims' apartment was admitted to demonstrate the subsequent actions taken by police in their investigation and did not constitute hearsay. See *People v McAllister*, 241 Mich App 466, 470; 616 NW2d 203 (2000). Because the trial court properly instructed the jury by providing a limiting instruction regarding how this testimony was to be used, and jurors are presumed to follow a trial court's instructions, we find no error. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Moreover, even if the admission of this evidence was error it does not constitute grounds for vacating the verdict or granting a new trial. MCL 769.26; MCR 2.613(A); *People v Whittaker*, 465 Mich 422, 427; 635 NW2d 687 (2001). Given defense counsel's opportunity for cross-examination of the detective and the evidence of defendants' guilt, the prosecutor's isolated question and response by the witness was harmless.

Defendants also objected to the testimony on the basis of relevancy and assert it should not have been admitted in accordance with MRE 402. "Materiality" of evidence, in relevancy determinations, comprises a requirement that the offered evidence is "related to any fact that is of consequence to the action." *People v Mills*, 450 Mich 61, 67; 537 NW2d 909 (1995); mod 450

Mich 1212 (1995) (internal quotation marks omitted). In this case, defendants asserted they were not responsible for the killings and that unidentified third parties committed the offenses. The testimony of the detective was not offered to demonstrate the culpability of defendants but rather that police did focus on other potential suspects, who were eliminated through their investigation and led police to focus on defendants. Without this information, the jury would have been left to ponder whether the police conducted a thorough investigation given the assertions and implications by defendants that police failed to pursue evidence pertaining to other viable suspects. As such, this evidence was relevant to the case.

Further, even if this Court were to determine that the evidence was irrelevant, reversal is neither required nor mandated. Witnesses identified defendants as being at the scene of the crime. Joyce Jordan observed Dennis Vesey retrieve a handgun from his vehicle shortly before gunshots occurred. Pittman, a confessed accomplice, identified defendants as the perpetrators. Tyranique initially identified Dameko Vesey, through recognition of his voice, as one of the masked men in the apartment. Hence, the admission of the brief comment by the detective that no evidence was discovered placing other possible suspects in the apartment did not affect the outcome of trial and reversal is not required.

C. Ineffective Assistance of Counsel

Defendants contend myriad errors by their respective counsel, rendering them ineffective. Whether counsel was ineffective is a question of law, which this Court reviews de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "A claim for the ineffective assistance of counsel must be raised by a motion for a new trial or an evidentiary hearing." *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). To the extent that defendants assert grounds on appeal regarding the ineffective assistance of counsel, which were not addressed in their motion for new trial or request for a *Ginther*[8] hearing, the allegations are not preserved for appellate review and this Court's review is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

In order to prevail on a claim for ineffective assistance of counsel, a defendant must demonstrate that "his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial," and that if these deficiencies had not occurred, defendant would not have been convicted. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000) (citations omitted). In addition, a defendant must overcome the presumption that counsel's conduct comprised sound trial strategy and that counsel need not pursue meritless arguments or positions. *Snider, supra* at 425.

Defendants first contend that trial counsel was ineffective because they failed to secure certain witnesses for trial. Specifically, defendants assert counsel secured the wrong Maurice Robinson.[9] At trial, Tanet Jordan asserted Maurice Robinson had broken a breakfast date with

[8] *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973).

[9] Maurice E. Robinson was available and questioned by counsel at trial. Defendants contend that counsel procured the wrong individual and that Maurice Leshawn Robinson should have been made available.

her and had implied knowledge of the murders. Tanet did not know Maurice's last name. In trying to identify this individual, police showed Tanet fifty-three photographs, which comprised the "mugshots" of all individuals by the name of Maurice they had available. Tanet selected one of the photographs as being the individual she discussed with police. Based on this information, Maurice E. Robinson was brought to the trial court for questioning. The only suggestion that the "wrong" Maurice Robinson was brought in for trial was testimony by Detective Patrick Bell that the photograph identified by Tanet was of Maurice Leshawn Robinson. Notably, the Maurice Robinson defendants asserted was involved in the murders had three teardrop tattoos on his cheek. Maurice E. Robinson, the individual procured for trial, met this unique description. When questioned by counsel Robinson denied knowing Tanet and having made the alleged statements. Defendants assert that had the "correct" Maurice Robinson been secured and questioned that he would have acknowledged being familiar with Tanet and the prior statement attributed to him. However, this is mere speculation on the part of defendants. In addition, even if another Maurice Robinson was identified as the proper witness, had he denied the statement purportedly made to Tanet we would remain in the same position, with the alleged statement comprising inadmissible hearsay.

Defendants also claim ineffective assistance of counsel because of the failure of their attorneys to provide for the attendance of Cynthia Mack at trial. Reportedly, while in the Washtenaw County Jail, Pittman made the acquaintance of Mack, another prisoner, and solicited her assistance in determining ways to make her story more "believable." Pittman denied recalling any such conversation and counsel implied that Mack would testify regarding this verbal exchange. However, Mack was never called to testify. Defendants assert on appeal that their counsel was ineffective for failing to subpoena Mack or seeking a continuance to locate her.

Although counsel asserts Mack was interviewed before trial and said she would testify that she provided Pittman with "tips" to make her lies more believable, there has been no submission provided regarding what the actual content of her purported testimony would have comprised. Obviously, counsel had access to Mack and did not call her. Defendants now speculate that this was a failure on the part of counsel rather than a conscious choice. "Decisions regarding what evidence to present . . . are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). In addition, to the extent that testimony by Mack is sought to discredit Pittman regarding her veracity, the proffered evidence is merely cumulative. This is unnecessary, as both Pittman and the prosecutor acknowledged that she had lied on numerous occasions both in court and to police.

Defendant Dennis Vesey contends his counsel was ineffective by stipulating to DNA evidence rather than requiring expert testimony regarding the material found under Roberson's fingernails. Reportedly the DNA technician found evidence of male DNA under Roberson's fingernails and excluded defendants as contributors. The prosecutor indicated she only intended to call the technician to testify that the most likely source of this DNA evidence was Roberson's minor child, Taurus Hill, Jr. Ultimately, the following stipulation was approved and entered by all counsel:

> The DNA obtained from the beer can lids, glasses and cigarette butts tested in this case matched the known DNA samples of Taurus Hill and/or Tayquelea Roberson. Dennis Vesey, Dameko Vesey and Michael McGaha are excluded as

> having been DNA donors for the above mentioned items. No results were obtained from the television, remote control buttons or the shell casing due to insufficient and/or degraded DNA.

As discussed, *supra*, in conjunction with counsel's decision to not produce Mack at trial, decisions regarding what evidence to present are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *Id.* at 76-77. In addition, defendant only speculates that the unidentified DNA could have come from a third party perpetrator in support of the defense theory. However, defendant fails to produce any evidence to support their assumption that the evidence might have been exculpatory. We would further note that defendants' counsel initially sought to preclude submission of any DNA evidence based on the inability of the prosecutor to comply with the deadlines imposed for pretrial discovery. Arguably, the agreement by counsel to the above stipulation was beneficial to defendants because it confirmed the lack of physical evidence linking defendants to the crime scene.

Defendant Dennis Vesey asserts trial counsel was ineffective in the cross-examination of Tanet Jordan. Defendant contends that proper questioning of this witness would have enabled counsel to impeach Pittman's testimony. Reportedly, before trial Pittman told Tanet that she never entered the victims' apartment and Tanet testified to this statement at the preliminary examination. Defendant asserts that if counsel had questioned Tanet on this discrepancy at trial, Pittman's testimony would have been critically impeached. However, given the plethora of admissions by Pittman at trial that she routinely lied at the preliminary examination, to police and others investigating these events, such a revelation at trial would not have the impact presumed by defendant on appeal. As noted previously, this Court will not second guess or substitute its judgment with regard to matters of trial strategy. *Rockey*, *supra* at 76-77.

Defendant Dennis Vesey further contends error regarding the admission of photographs of weapons seized from his residence. Notably, defendant incorrectly references exhibit 33, which is actually a photograph of a scale taken from defendant's home and does not depict any weapons. Instead, we note that exhibit 31 reportedly depicts ammunition seized from the residence, which were not objected to by counsel.[10] The ballistics expert, Michigan State Police Detective Sergeant Robert Rayer, testified almost exclusively regarding the bullets retrieved from the crime scene. The only reference to the ammunition seized from defendant's home was testimony that bullets of the same caliber as the murder weapons had been seized from that location. On cross-examination, counsel for defendants were able to affirm that the weapons used in this crime had not been recovered and that the ammunition recovered from defendants' respective homes could not be matched to the bullets procured from the crime scene. Defendant further suggests that the admission of this evidence was contrary to the trial court's prior ruling regarding the exclusion of the weapons found at his home. However, although the trial court did

[10] This Court is unable to confirm the content of the cited exhibits based on their failure to append or provide them with the lower court record.

exclude the weapons retrieved from defendant's home, it did not preclude "the tray, the scale, the cash, and the bullets" based on the trial court's determination "that that is part of the res gestae."

Defendant Dennis Vesey next argues in his Standard 4 brief that counsel was ineffective in failing to suppress identifications by Tanet and Joyce Jordan. Defendant asserts the identifications were the result of unduly suggestive pretrial procedures, which involved the repetitive showing of his photograph by police to the witnesses. Defendant asserts the impropriety of the identification procedure is demonstrated by the failure of the Jordans to identify him from photographs shown to them within days of the crime, yet selecting his photograph more than a year later as the perpetrator. Defendant also contends the photograph was unduly suggestive as he was the only light-skinned male with shoulder length braided hair and that the remaining photographs in the array depicted neighbors or persons associated with neighbors of the Jordans. Defendant further asserts Joyce Jordan's identification was influenced by the police offer of assistance when she was incarcerated.

Contrary to defendant's assertion, Tanet Jordan testified at the preliminary examination that she did identify his photograph from an array within days of the crime. Tanet again identified defendant's photograph from an array over one year later. Her indication that she identified defendant's picture "at least a hundred times" was clearly an exaggeration and was intended only to convey Tanet's assertion that she had consistently identified defendant as "Juan" in the photographic arrays presented by police. Joyce Jordan also identified defendant as "Juan" from a photographic array shown to her one day after the crimes occurred. Although one year later, Joyce indicated that "Juan's" photograph was not among the photographs initially shown to her, she did identify defendant through a photograph as "Juan." More specifically, when questioned whether Joyce had seen the perpetrator's photograph but failed to identify it previously, she replied, "I didn't see his picture I seen the picture of the one of the guys [sic] that I thought was there . . . ." Defendant provides no support or evidence for his assertion that the identifications by the Jordans a year after the event were the result of promises by police for assistance in exchange for the identifications.

Defendant Dennis Vesey suggests the manner and frequency of presentation of his photograph to these witnesses was unduly and impermissibly suggestive. Our Supreme Court has ruled "in order to sustain a due process challenge, a defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification." *People v Kurylczyk*, 443 Mich 289, 302-303; 505 NW2d 528 (1993). "The relevant inquiry . . . is not whether the lineup photograph was suggestive, but whether it was unduly suggestive in light of all the circumstances surrounding the identification." *Id.* at 306. Although defendant indicates that his photograph, based on descriptions obtained, unfairly singled him out from others in the array, he fails to note that witnesses were shown "stacks" of photographic arrays and not just the one sheet containing his picture. Even if defendant appeared physically unique on the one array, there is no evidence that other photographs within the multiple arrays provided to witnesses did not coincide with his description or appearance. This Court has previously ruled "physical differences among the lineup participants do not necessarily render the procedure defective and are significant only to the extent that they are apparent to the witness and substantially distinguish the defendant from the other lineup participants." *People v Hornsby,* 251 Mich App 462, 466; 650 NW2d 700

(2002). In addition, "physical differences generally relate only to the weight of an identification and not to its admissibility." *Id.*

Defendant further contends the photographs were unduly suggestive because three of the individuals in the array were neighbors of the Jordans, despite the fact that Tanet Jordan had indicated to investigators that the perpetrators did not live in her apartment complex. Notably, the first array of photographs contained four photographs of individuals, besides defendants, who have not been identified as residing in the apartment complex. The photographic array displayed one year later did include three individuals, including codefendant McGaha, who lived in the apartment complex. However, Tanet Jordan specifically denied any familiarity with one of these individuals as a complex resident. Further, it was logical for police to include these individuals, as they were people who frequented the complex in order to verify that identification of defendants was not merely a function of confusion based on familiarity. Finally, we would note that much of the witness testimony pertaining to identification and photographic arrays is confusing at best and can be attributed to their acknowledgement that they were uncooperative and frequently lied to police during the investigation, necessitating the repeated presentation of numerous photographic arrays in an attempt to obtain truthful statements.

Additionally, even if the photographic identification procedures were suggestive, independent bases exist to render the identifications reliable. The challenged witnesses were familiar with defendant, having observed him at the apartment complex on occasions prior to the murders. Although neither Tanet nor Joyce Jordan assert having a personal relationship with defendant Dennis Vesey, they both recognized him as the individual they knew as "Juan." This prior knowledge provided an independent basis for the subsequent in-court identifications. *People v Davis*, 241 Mich App 697, 702-703; 617 NW2d 381 (2000) (citations omitted).

Ultimately, defendant's argument is merely a red herring. The identifications challenged by defendant Dennis Vesey were not made by eyewitnesses to the actual crime. The photographic presentations were an attempt by police to identify people in the vicinity of the crime scene, particularly given the reluctance of residents in the apartment complex to become involved or cooperate. Although the record reflects that Joyce Jordan consistently identified photographs of defendant, the challenged identifications did not serve to convict him. Rather, substantial evidence by an accomplice, Pittman, placed defendant Dennis Vesey in the apartment with the gun. Therefore, even if we were to conclude that there were not sufficient independent bases for these identifications or that the photographic lineups were suggestive, reversal is not warranted because harmless error analysis applies based on the existence of overwhelming evidence of defendant's guilt. *People v Winans*, 187 Mich App 294, 299; 466 NW2d 731 (1991). Consequently, defendant is unable to demonstrate that he was prejudiced by counsel's failure to bring a motion to suppress the identifications, as a claim of ineffective assistance of counsel cannot be predicated on the failure to make a frivolous or meritless motion. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

Defendant Dennis Vesey argues that trial counsel was also ineffective in questioning Tanet Jordan, suggesting that further inquiry by counsel would have demonstrated the witness confused defendant's vehicle with that of Jovan Hurston. The difficulty with this premise is the fact that Pittman's testimony contradicts this theory coupled with the identification by both Pittman and Tanet Jordan of defendant's beige SUV in the parking lot immediately before the crimes occurred. In contrast, it is undisputed that Hurston drove a burgundy Jeep Cherokee,

which is unlikely to be confused with a beige Envoy. When Hurston drove Pittman back to the complex before the murders, she requested he park a distance from the apartments so that her mother would not observe his vehicle. Consequently, it was reasonable for defense counsel to limit questioning regarding Hurston's vehicle, as it would merely have served to reinforce the assertions of witnesses regarding the presence of defendant's vehicle at the crime scene. *Rockey, supra* at 76-77.

Defendant Dennis Vesey further contends that his counsel was ineffective in failing to call certain individuals as witnesses. Specifically, he asserts his trial counsel should have called the minor children, Dakaisia and Jasmine, as witnesses to the murders to testify that the perpetrators were masked. He further indicates Demetrius Simms should have been placed on the stand for questioning regarding a phone call she received from Pittman and that Terry Joplin and Isaiah Kershaw should have been called to testify regarding vehicles they observed at the scene earlier on the night of the murders. Once again, we note that the determination regarding what witnesses and evidence to present are matters of trial strategy that will not be second-guessed in hindsight. *Rockey, supra* 76-77.

Allegedly, Demetrius Simms received a phone call from Pittman days after the murders and left a message for her stating, "I saw a boy that looked just like your son. Tell him he's got nothing to worry about." Simms disavowed any understanding of the meaning of the message when questioned by police. Defendant construes this statement to be exculpatory and suggestive that Pittman lied to police regarding her identification of the perpetrators. However, this is mere speculation. Defendant fails to explain how the failure to present this witness would amount to the ineffective assistance of counsel, as it cannot be demonstrated that the statement had any relationship to the murders or Pittman's involvement in the crimes. Viewed even in a positive light, the proposed testimony was merely cumulative by implying what had already been acknowledged to be Pittman's penchant for dishonesty.

Defendant Dennis Vesey further contends counsel was ineffective for failing to present the testimony of two of the minor witnesses to the murders, Dakaisia and Jasmine. Primarily, defendant contends that their testimony that the perpetrators were masked supported the assertion that Pittman fabricated her testimony and served to bolster the testimony of Tyranique. However, defendant ignores the fact that the eldest of the three minor witnesses did testify regarding the perpetrators being masked when entering the apartment, making testimony by the additional witnesses merely cumulative. In addition, it was objectively reasonable for counsel to not call these young children to the stand as it could have served to alienate members of the jury and did not deprive defendant of a substantial defense.

Defendant Dennis Vesey further alleges counsel was ineffective for failing to call Joplin and Kershaw to testify regarding their observation of a silver Durango or tan Envoy in the apartment complex parking lot on the night of the murders. Notably, defendant does not contend that these individuals could identify ownership or associate specific individuals with the vehicle. Defendant contends that his SUV, a beige Yukon, was not present on the night of the murders. Throughout the trial witnesses identified several different vehicle models in the parking lot just prior to the murders. Despite inconsistencies in identifying the model of the vehicle they observed, all witnesses concurred that the vehicle was an SUV and either silver or tan in color. Significantly, all the varying models or vehicle makes identified by witnesses are substantially similar in size, design and manufacturer. Defendant fails to demonstrate how additional

testimony by these individuals would have proven his absence from the crime scene based on confusion regarding the model of the vehicle observed given the overwhelmingly consistent descriptions of the vehicle elicited from witnesses.

D. Prosecutorial Misconduct

Defendants contend the prosecutor engaged in misconduct during closing argument regarding her "explanation" of the masks observed by Tyranique on the perpetrators, which conflicted with Pittman's assertion that defendants were not wearing masks when they entered the apartment and that the failure of their counsel to object immediately to the statements comprised ineffective assistance of counsel. Defendants further assert the prosecutor improperly vouched for the credibility of Pittman. Defendant Dennis Vesey separately argues that the prosecutor improperly commented during rebuttal on the testimony of Tanet Jordan regarding her observation of defendant's vehicle days after the murders despite the fact that his car had been impounded.

Claims regarding prosecutorial misconduct are reviewed on a case-by-case basis, looking at the prosecutor's comments in context and in light of arguments by the defense and their relationship to evidence admitted at trial. *People v Thomas,* 260 Mich App 450, 454; 678 NW2d 631 (2004). The test for determining "prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *People v Dobek,* 274 Mich App 58, 63; 732 NW2d 546 (2007). However, "[r]eview of alleged prosecutorial misconduct is precluded unless the defendant timely and specifically objects, except when an objection could not have cured the error, or a failure to review the issue would result in a miscarriage of justice." *People v Callon,* 256 Mich App 312, 329; 662 NW2d 501 (2003). Because the asserted errors were not properly preserved by contemporaneous objections or requests for curative instructions, the review by this Court is for plain, outcome-determinative error. *Id.* Reversal is not warranted unless the "plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of [the] judicial proceedings." *Id.*

Defendant's first assertion of misconduct involves a statement by the prosecutor during rebuttal pertaining to the discrepancies in testimony between Tyranique and Pittman regarding whether the perpetrators wore masks. Notably, defense counsel raised discrepancies regarding this testimony in closing argument and impugned the veracity of Pittman. After the conclusion of closing arguments, defendants' counsel objected to the prosecutor's statement that Tyranique was mistaken regarding the masks suggesting the prosecutor's explanation for the discrepancy encompassed facts not in evidence.

Specifically, the prosecutor stated, in relevant part:

> Defense counsel says that you shouldn't believe Nerissa Pittman. That she's lying. They somehow think that I have pitted Nerissa Pittman's testimony against that of Tyranique Hill. Why? I'm telling you there is no conflict between Nerissa Pittman and Tyranique Hill. And I'm not saying Tyranique is a liar, she didn't see a mask on their face believe Nerissa Pittman. What I'm saying to you is that the Judge is going to read you an instruction that talks about the credibility of the witnesses and how you evaluate that. And one of those things that she's going to tell you is that sometimes witnesses are just wrong. And that doesn't

> mean you disregard all of their testimony. It just means about that one instance or that one issue they're wrong.
>
> And frankly I'm glad that Tyranique put masks on the mens [sic] faces that came into that house and killed her father because she doesn't have to think about the face that she saw do that. What she did was protect herself. She knows a little bit. She knows that there were braids involved. She can bring herself to identify the man that was there earlier. But that's not testimony that's in conflict with Nerissa Pittman. I'm not saying disregard Nerissa Pittman or disregard Tyranique Hill those things fit together.

In this instance, the prosecutor was responding to assertions by defense counsel that Tyranique's version of the events was correct and that Pittman was lying. "Although a prosecutor may not argue a fact to the jury that is not supported by evidence, a prosecutor is free to argue the evidence and any reasonable inferences that may arise from the evidence." *Callon, supra* at 330. The prosecutor's comments were merely an attempt to reconcile discrepant testimony. The prosecutor acknowledged the conflict and proposed an explanation without improperly vouching for the credibility of either witness. Because the prosecutor's comments were based on the evidence and merely instructed the jury to make their own determination of credibility, they were not improper.

Next, defendants assert the prosecutor engaged in misconduct by improperly vouching for the credibility of Pittman. Defendants rely again on discrepancies between the testimony of Tyranique and Pittman regarding the manner and number of perpetrators gaining entry to the apartment. In closing arguments, defendants' counsel referred to Pittman as both a "liar" and a "sociopath." The comments by the prosecutor pertaining to Pittman, to which defendants now object encompass the following:

> And along those lines of, of the mask . . . Taurus Hill wouldn't be stupid enough to look out and see masked men and let them in. And Nerissa Pittman wouldn't be stupid enough to make up a story with three unmasks [sic] men when it would be much easier to just go along with what Tyranique said. It would be much easier to put masks on those men. Put masks on herself and just run with that theory.
>
> Why would she go to the effort of making up this convoluted story that requires that she call Dennis Vesey earlier in the evening. That one to two weeks prior that she mentions to Darius Frazier that Taurus Hill's a person whose never been robbed but has money and drugs to steal.
>
> And I agree with defense counsel you have to evaluate the credibility of all of these witnesses. That's what your job is.
>
> When Nerissa Pittman left the stand was she trying to disrupt the proceedings or was she – was she scared. Did she come back in here and say I'm nervous, I'm scared. She is a person who has pled guilty to murder. She's not an angel. We're not putting her up in front of you saying listen to the angel that's come in here.

> I'm putting her up in front of you saying listen to the person who, who conceived this plan. Who knew Darius Frazier was a guy who could get things done. Who saw him give the guns to Dennis Vesey. Who knew Dennis Vesey had the guns. Saw Dennis Vesey with the guns the same guns that she saw Darius Frazier give him. And those people were murdered and they were robbed and she knew it was going to happen and she participated in it. So please evaluate her credibility. Why would she come in here and make up some convoluted difficult to tell story if that's not what happened.

In addition, in the opening of her rebuttal statement, the prosecutor acknowledged "that I'm going to convict bad men with a bad woman." In no manner, when taken in context, can the prosecutor's statements be construed as improper vouching for the credibility of this witness. In addition, the prosecutor specifically acknowledged that the determination of credibility was for the jury. As a result, the comments constituted merely the prosecutor's argument based on the facts in evidence and a response to defendants' very strong assertions impugning the veracity of Pittman regarding the facts in evidence supporting this witness's version of the events that transpired in the commission of the murders.

Finally, defendant Dennis Vesey contends the prosecutor engaged in misconduct by implying defendant's counsel misstated or mischaracterized evidence regarding Tanet Jordan's testimony that she observed defendant with Pittman and his vehicle several days after the murders, despite the fact that the vehicle had been impounded. Defendant's counsel argued that Tanet Jordan's statement was evidence of her lack of credibility and implied that this further corroborated defendant's assertion that the witness had mistakenly identified Dennis Vesey as "Juan." In rebuttal, the prosecutor responded:

> I did not object during Mr. Minock's closing when he said that Tanet Jordan testified that several days after this happened she saw Nerissa Pittman get into an SUV. But I submit to you that she did not say that from that witness stand. And if you think about that and use your collective memories I don't think that you will hear or remember that she said anything to that affect [sic]. And he wants to offer that as something important because the – because the Yukon at that time had been seized so Tanet must be a liar. And if you find that that's important or probative information then watch Tanet's testimony again because she didn't say it. But just as the Judge has cautioned you, you have to decide that. That's your memory.

Defendant's suggestion that the above statement constituted improper vouching for the credibility of a witness is misplaced. The prosecutor merely disputed the accuracy of counsel's statement regarding the evidence presented, but properly indicated that any determination regarding credibility or accuracy of the statement was for the jury to determine.

In addition, when defining what constituted evidence, the trial court specifically instructed the jury:

> The lawyers' statements and arguments are not evidence they are only meant to help you understand the evidence and each sides [sic] legal theories. The lawyers' questions to the witnesses also are not evidence. You should consider

> these questions only as they give meaning to the witnesses' answers. You should only accept things lawyers say that are supported by the evidence or by your own common sense and general knowledge.

The trial court also provided a special instruction regarding Pittman's testimony as an accomplice, noting:

> You should examine an accomplice's testimony closely and be very careful about accepting it. You may think about whether the accomplice's testimony is supported by other evidence because then it may be more reliable. However, there is nothing wrong with the prosecutor using an accomplice as a witness. You may convict the defendant based only [sic] an accomplice's testimony if you believe the testimony and it proves the defendant's guilt beyond a reasonable doubt.

The trial court went further and instructed the jury regarding factors to consider in evaluating an accomplice's testimony, concluding that "you should consider an accomplice's testimony more cautiously than you would that of an ordinary witness. You should be sure you have examined it closely before you base a conviction on it." Given the instructions provided by the trial court and our presumption that jurors follow their instructions, *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), we find no support for defendant's assertion of error. In addition, based on our determination that prosecutorial misconduct did not occur, defendant's contention of ineffective assistance of counsel based on the failure of his attorney to object to the challenged statements during rebuttal argument is unsubstantiated. *Darden, supra* at 605.

E. Denial of Motion for New Trial or Evidentiary Hearing

Defendants contend the trial court erred in denying their motion for a new trial or evidentiary hearing based, primarily, on the letters written by Ross and Pittman, which defendants characterize as newly discovered evidence. Defendant Dennis Vesey contends that the content of these letters confirms the defense theory of third party culpability and calls into question the veracity of Pittman. Specifically, defendant contends that the trial court should have held an evidentiary hearing with Ross because if he had testified consistently with the letter written it would have provided support for the admission of evidence of third party culpability. Defendant Dameko Vesey asserts the trial court's denial of the motion for new trial or evidentiary hearing denied him the effective assistance of counsel and due process by precluding his ability to "prove his contentions" pertaining to third party culpability. On remand, defendant Dameko Vesey contends further proceedings should be held before an alternative judge.

This Court reviews a trial court's determination regarding a motion for new trial for an abuse of discretion, and its factual findings are reviewed for clear error. *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000).

A new trial may be granted based on newly discovered evidence. *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993). In order to obtain a new trial on this basis, a defendant must demonstrate (a) "the evidence itself, and not just its materiality, was newly discovered"; (b) "the newly discovered evidence was not cumulative"; (c) the new evidence would probably cause a different result upon retrial; and (d) the defendant could not, with

"reasonable diligence, have discovered and produced the new evidence at trial." *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003). It is defendant's burden to show that the proffered evidence is both material and newly discovered. *People v Van Camp*, 356 Mich 593, 602; 97 NW2d 726 (1959).

With regard to the Pittman letter, we determine that this evidence was, at best, merely cumulative. There was no dispute throughout the trial that Pittman lied repeatedly to investigators. Evidence that testimony was perjured may warrant a new trial. *People v Barbara*, 400 Mich 352, 362-363; 255 NW2d 171 (1977). However, in the letter, Pittman only indicated that she "told them what they wanted to hear" and asserted her perception regarding the unfairness of life, but did not address either directly or indirectly defendants' guilt or innocence. Any interpretation that the letter demonstrates that Pittman committed perjury is merely speculative. At best, the letter could only be used in an attempt to impeach Pittman's testimony. However, "[n]ewly discovered evidence is not ground[s] for a new trial where it would merely be used for impeachment purposes." *Davis, supra* at 516. Given the numerous admissions regarding Pittman's lack of veracity throughout the trial, it is highly unlikely that this letter would have made a different result probable on retrial.

Police interviewed Ross upon receipt of his letter. Even assuming the letter was newly discovered, it is insufficient to warrant a new trial or evidentiary hearing. As discussed, *supra*, Ross was uncooperative and denied having information pertaining to the perpetrators of the crimes. Again, the only use for the letter, had it been admissible, would be for the purpose of attempting to impeach Swanson or Ross. However, this use is not sufficient to support the grant of a new trial. *Davis, supra* at 516. Further, the letter constitutes merely cumulative evidence as defendants elicited testimony in support for their theory of third party culpability throughout trial.

Based on our determination that the trial court did not abuse its discretion in denying defendants' motion for a new trial or evidentiary hearing, the remainder of defendant Dameko Vesey's arguments pertaining to the ineffective assistance of counsel, denial of due process and the need for reassignment to an alternative judge are rendered moot. *People v Cathey*, 261 Mich App 506, 510; 681 NW2d 661 (2004).

F. Cumulative Error

The final issue on appeal is defendants' contention that the cumulative effect of errors alleged at trial was so prejudicial that they were denied a fair trial. Cumulative error arguments are reviewed to determine if the combination of alleged errors denied the defendant a fair trial. "The cumulative effect of several minor errors may warrant reversal even where the individual errors did not require reversal." *People v Hill*, 257 Mich App 126, 152; 667 NW2d 78 (2003). "It is true that the cumulative effect of several errors can constitute sufficient prejudice to warrant reversal where the prejudice of any one error would not." *LeBlanc, supra* at 591. As outlined, *supra*, there are no trial errors to aggregate, which denied defendants a fair trial or caused unfair prejudice to defendants. *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003). "Because no errors were found with regard to any of the above issues, a cumulative effect of errors is incapable of being found." *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

In addition, we note that one of the errors asserted involved the trial court's "refus[al] to redact irrelevant and prejudicial content from the alibi witness' statements." However, defendants have failed on appeal to delineate any argument regarding this assertion or to provide any law in support. "The failure to brief the merits of an allegation of error constitutes an abandonment of the issue." *People v McPherson*, 263 Mich App 124, 136; 687 NW2d 370 (2004).

Affirmed.

/s/ Michael J. Talbot
/s/ Mark J. Cavanagh
/s/ Brian K. Zahra